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~~No. 80-1584~~

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In the Supreme Court of the United States

October Term, 1980

In the Matter of James F. CRIST, JR.,

Debtor,

James F. CRIST., Jr., Debtor, in

possession, Cross-Respondent,

vs.

Jane S. CRIST,

Cross-Petitioner

MEMORANDUM OPPOSING CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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SUMMARY OF ARGUMENT

The Cross-Petition for Certiorari should be denied for two reasons: (I) the Petition having been denied May 18, 1981, the Cross-Petition should be denied under Supreme Court Rule 20.5; (II) On the issue of the constitutionality of the statute involved, the decision of the Court of Appeals was correct.

ARGUMENT

I.

THE CROSS-PETITION SHOULD BE DENIED UNDER RULE 20.5

The decision of the Fifth Circuit Court of Appeals was filed December 17, 1980. The Cross-Petition for Certiorari was not filed within ninety days of that date, but within thirty days of Respondent's receipt of the Petition for Certiorari. The Cross-Petition for Certiorari would otherwise have been untimely, but for Supreme Court Rule 19.5.

The Petition for Certiorari having been denied on May 18, 1981, the Cross-Petition should now be denied under Supreme Court Rule 20.5.

II.

THE COURT OF APPEALS CORRECTLY CONCLUDED SECTION 17a(7) OF THE BANKRUPTCY ACT OF 1898 (FORMER 11 U.S.C. § 35a(7)) VIOLATED THE EQUAL PROTECTION COMPONENT OF THE DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT

The Court of Appeals held: (1) Section 17a(7) of the Bankruptcy Act of 1898 (former 11 U.S.C. § 35a(7)) violated the equal protection component of the due process clause of the Fifth Amendment, but (2) refused to declare it a nullity and, as a remedy, extended the burden of non-dischargeability to wives.

The Petition for Certiorari asked review of issue (2), the remedy. The Petition was

denied May 18, 1981.

The Cross-Petition for Certiorari asked review of issue (1), the holding of unconstitutionality. On this issue, Cross-Respondent submits the Court of Appeals decision was correct.

Section 17a(7) of the old Bankruptcy Act (former 11 U.S.C. § 35a(7)) provides in relevant part as follows:

> . . .discharge in bankruptcy shall release a bankrupt from all his provable debts, whether allowable in full or in part except such as . . .(7) are for alimony due or to become due or for maintenance or support of wife. . .

In essence, this section provides the benefit of non-dischargeability in bankruptcy to payments presently or prospectively due to a specially defined class of creditor, limited to females, and imposes the burden of non-

dischargeability on a reciprocally defined class of bankrupt, limited to males, solely on the basis of sex. In so doing, Section 17a(7) denies males the equal protection of the laws, in violation of the Due Process Clause of the Fifth Amendment. For this reason the Fifth Circuit found Section 17a(7) unconstitutional.

In recent years the Court has repeatedly been called upon to deal with sex-based distinctions in Federal and State statutes conferring rights, benefits and entitlements. It has uniformly struck down statutes when the gender distinction was based on traditional assumptions concerning the dependence of the female and where the use of the "gender presumption," served only the administrative convenience of the government. Orr v. Orr, 440 U.S. 268 (1979);

Califano v. Goldfarb, 430 U.S. 199 (1977); Stanton v. Stanton, 421 U.S. 7 (1975); Weinberger v. Wiesenfeld, 420 U.S. 636 (1975); Frontiero v. Richardson, 411 U.S. 677 (1973); Stanley v. Illinois, 405 U.S. 645 (1972); Reed v. Reed, 404 U.S. 71 (1971).

These cases teach that a statute may neither confer a pecuniary benefit upon females to the exclusion of males on the basis of traditional assumptions and generalizations concerning the dependent status of women nor confer such benefits automatically upon women and upon males only if they prove that they have the qualification automatically ascribed to females. Furthermore, where a pecuniary benefit is granted by statute on the basis of these traditional assumptions of dependency to alleviate a

perceived need, that need must be established on a due consideration of the facts and circumstances of each case, and cannot be statutorily presumed to be true of all members of one sex and no member, or only certain members, of the other.

The Court has established guidelines for courts to follow when examining the constitutionality of statutes challenged for sex discrimination. In analyzing Section 17a(7), the Fifth Circuit followed the Court's guidelines. The Circuit Court examined the operation of the statute, the governmental objectives it furthered, and the intent of Congress behind its passage. The Fifth Circuit correctly concluded that Section 17a(7) violated the equal protection component of the due process clause of the Fifth Amendment because it failed to measure

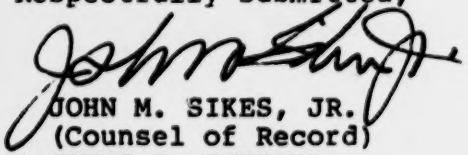
up to the constitutional standards of due process and equal protection enunciated by the Court.

The Cross-Petitioner has demonstrated no failure in the Fifth Circuit's analysis. Therefore, since the decision that Section 17a(7) is unconstitutional rests upon a sound footing it should not be disturbed.

CONCLUSION

For the foregoing two reasons, the Cross-Petition for Certiorari should be denied.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I, John M. Sikes, Jr., hereby certify that I am a member of the Bar of the Supreme Court of the United States, that I represent the party on whose behalf the foregoing Memorandum Opposing Cross-Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit is filed, and that on June 23, 1981, I served counsel for all interested parties in the foregoing matter and the Solicitor General of the United States with the following number of copies by depositing those copies in the United States Mail in properly addressed envelopes with adequate first class postage thereon addressed to:

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All parties to be served have been served.

This 23rd day of June, 1981.

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